

# Reducing Uncertainty in Anti-SLAPP Protection

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## I. INTRODUCTION

Public participation has long been considered an essential element of effective governance, resolution of broad social problems, and responsible resource management. The values underlying First Amendment protections and pluralism demand that individuals and groups have the opportunity to make their voices heard, without the threat of retaliation by those equipped with greater financial or institutional power. Executive agencies engage the public in their regulatory decisions through notice-and-comment processes,<sup>1</sup>

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<sup>1</sup> The Administrative Procedure Act, for instance, requires that federal agencies must provide the public with notice and an opportunity to comment on proposed substantive rules and regulations before they are finalized. 5 U.S.C. § 553(b)–553(c) (1994) (“General notice of proposed rulemaking shall be published in the Federal Register . . . . After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.”).

while legislators answer to voters. It is the third branch of government, the judiciary, that has become the backdrop for financially powerful interests' attempts to silence groups and individuals who publicly oppose their actions with the threat of high-stakes litigation. Corporations, developers, and other private interests use strategic lawsuits against public participation (SLAPPs)<sup>2</sup>—defined as suits that “(1) involve communications made to influence a government action or outcome, (2) which result in civil lawsuits (complaints, counterclaims, or cross-claims) (3) filed against non-governmental individuals or groups (4) on a substantive issue of some public interest or social significance”<sup>3</sup>—to intimidate individuals and organizations that speak out against corporate decisions, development projects, government actions or operations, or other activities that affect their financial interests.<sup>4</sup> Plaintiffs file SLAPPs not with the intent of recovering from defendants, but rather to silence individuals and groups that have publicly opposed the plaintiff's actions or interests with the threat of costly, time-consuming, and potentially reputation-damaging litigation.<sup>5</sup> The threat of such litigation—

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<sup>2</sup> The acronym SLAPP was introduced by University of Denver Professors George W. Pring and Penelope Canan. GEORGE PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996).

<sup>3</sup> *Id.* at 209.

<sup>4</sup> SLAPPs punish individuals and groups for “reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.” George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 5 (1989). Certain criminal cases may also fall within the scope of state anti-SLAPP laws. See Kathleen L. Daerr-Bannon, *Cause of Action: Bringing and Defending Anti-SLAPP Motions to Strike or Dismiss*, in 22 CAUSES OF ACTION 2d 317, 323 (Clark Kimball & Scott Ryan eds., 2003); PRING & CANAN, *supra* note 2, at 9. State courts have adopted varying perspectives on the applicability of their respective state statutes to the reporting of crimes. Compare *Benoit v. Frederickson*, 908 N.E.2d 714, 718 (Mass. 2009) (“The reporting of a rape to police, which initiates the filing of a criminal complaint, is a petitioning activity encompassed within the protection afforded by [the Massachusetts anti-SLAPP statute].”), and *Wenger v. Aceto*, 883 N.E.2d 262, 266 (Mass. 2008) (holding that the filing of a criminal complaint application qualifies as petitioning activity for purposes of the Massachusetts anti-SLAPP statute), with *Varela v. Perez*, No. CV-08-2356-PHX-FJM, 2009 WL 4438738, at \*1 (D. Ariz. Nov. 30, 2009) (“The crime victim defendants’ report of criminal activity to the police is not a ‘petition to the government’ as that term is used in [Arizona’s anti-SLAPP statute]. Therefore, the statute has no application to the present case.”). Criminal SLAPPs, though relevant, are beyond the scope of this Note.

<sup>5</sup> See *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003) (SLAPPs “‘masquerade as ordinary lawsuits’ but are brought to deter common citizens from exercising their political or legal rights or to punish them for doing so.” (quoting *Wilcox v. Superior*

which is generally without merit—has a chilling effect on public participation and speech and consumes already-strained judicial resources.

As the prevalence of SLAPPs has increased, state legislatures have turned their attention to preserving their residents' First Amendment rights<sup>6</sup> and "protecting citizens from [the] David and Goliath power difference" that drives SLAPPs.<sup>7</sup> In an effort to combat these suits' intimidation effects and abuse of the judicial process, the legislatures of twenty-seven states<sup>8</sup> and one territory<sup>9</sup> have passed anti-SLAPP statutes.<sup>10</sup> Among the state statutes' common features is the stated purpose of the anti-SLAPP measure. The Ninth Circuit<sup>11</sup> has noted that California's anti-SLAPP legislation "was enacted to allow early dismissal of meritless first amendment cases aimed at

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Court, 33 Cal. Rptr. 2d 446, 450 (Cal. Ct. App. 1994)); *N. Am. Expositions Co. Ltd. P'ship v. Corcoran*, 898 N.E.2d 831, 835 (Mass. 2009) (describing SLAPPs as "actions designed not to win, but rather 'to deter or retaliate against individuals who seek to exercise their right of petition.'" (quoting *Wenger*, 883 N.E.2d at 266)); *Fisher v. Lint*, 868 N.E.2d 161, 165 (Mass. App. Ct. 2007) ("The purpose of filing a SLAPP suit is not to prevail in the matter, but rather to use litigation to chill, intimidate, or punish citizens who have exercised their constitutional right to petition the government to redress a grievance.").

<sup>6</sup> Anti-SLAPP legislation is seen as protecting First Amendment rights, including free speech, assembly, press, and petition. Daerr-Bannon, *supra* note 4, at 326. A New York district court observed that, "[i]n recent years, there has been a rising concern about the use of [SLAPPs] . . . . In response, New York State enacted a law specifically aimed at broadening the protections of citizens facing litigation *arising from their public petition and participation*." *Yeshiva Chofetz Chaim Radin, Inc. v. Vill. of New Hempstead*, 98 F. Supp. 2d 347, 358–59 (S.D.N.Y. 2000).

<sup>7</sup> *Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 314 (D.Mass. 2003).

<sup>8</sup> These states are Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, and Washington. For a current list of states that have passed anti-SLAPP statutes, see CALIFORNIA ANTI-SLAPP PROJECT, *States and Territories with Anti-SLAPP Statutes*, <http://www.casp.net/statutes/menstate.html> (last visited Nov. 7, 2010).

<sup>9</sup> 7 GUAM CODE ANN. §§ 17101–17109 (2005).

<sup>10</sup> The SLAPP phenomenon is not unique to the United States. *See generally* SUSAN LOTT, CORPORATE RETALIATION AGAINST CONSUMERS: THE STATUS OF STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPs) IN CANADA (2004); Travis Bover & Mark Parnell, *A Protection of Public Participation Act for South Australia*, <http://www.edo.org.au/edosa/research/public%20participation.htm>. (last visited Oct. 10, 2010).

<sup>11</sup> The Ninth Circuit is the only circuit in which federal courts apply states' anti-SLAPP statutes to federal claims; other federal courts treat anti-SLAPP claims as procedural, rather than substantive, matters.

chilling expression through costly, time-consuming litigation.”<sup>12</sup> Georgia courts, describing the state’s anti-SLAPP law, have also noted the statute’s foundation in First Amendment values,<sup>13</sup> as have the courts of Massachusetts,<sup>14</sup> New York,<sup>15</sup> Rhode Island,<sup>16</sup> Louisiana,<sup>17</sup> and Nevada,<sup>18</sup> among others. Beyond their shared purpose, these statutes’ provisions vary widely in nature and scope; however, despite their differences, these statutes all rely on certainty to achieve their purpose. This Note reviews the key sources of uncertainty in anti-SLAPP law, and suggests that, in order to

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<sup>12</sup> *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001). For an in-depth discussion of the purpose of California’s anti-SLAPP law, see *Wilcox v. Superior Court*, 33 Cal. Rptr. 2d 446, 449–50 (Cal. Ct. App. 1994).

<sup>13</sup> The court explained:

The General Assembly enacted the anti-SLAPP statute to encourage Georgians to participate in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances. . . . The coverage of the anti-SLAPP statute extends to ‘abusive litigation that seeks to chill exercise of certain First Amendment rights’ based upon defamation, invasion of privacy, breach of contract, and intentional interference with contractual rights and opportunities arising from speech and petition of government.

*EarthResources, LLC v. Morgan Cnty.*, 638 S.E.2d 325, 329 (Ga. 2006) (quoting *Browns Mill Dev. Co. v. Denton*, 543 S.E.2d 65, 68 (Ga. Ct. App. 2000)).

<sup>14</sup> The Massachusetts anti-SLAPP law “is intended to protect the ‘exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’” *N. Am. Expositions Co. Ltd. P’ship v. Corcoran*, 898 N.E.2d 831, 853 (Mass. 2009) (quoting *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 939 (Mass. 1998)).

<sup>15</sup> See *Yeshiva Chofetz Chaim Radin, Inc. v. Vill. of New Hempstead*, 98 F. Supp. 2d 347, 360 (S.D.N.Y. 2000) (“The clearly expressed intent of the legislature was to safeguard the free exercise of speech, petition and association rights . . . against those who would try to interfere with a citizen’s constitutional rights.” (internal quotation marks omitted)).

<sup>16</sup> See *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 752 (R.I. 2004) (explaining that the state’s “anti-SLAPP statute was enacted to prevent vexatious lawsuits against citizens who exercise their First Amendment rights of free speech and legitimate petitioning by granting those activities conditional immunity from punitive civil claims.”).

<sup>17</sup> In enacting the state’s anti-SLAPP statute, “[t]he Louisiana legislature’s intent [was] to prevent the abuse of the legal system by providing a procedural mechanism to dispense with meritless suits that have the purpose of chilling one’s freedom of speech.” *Lee v. Pennington*, 830 So. 2d 1037, 1042–43 (La. Ct. App. 2002).

<sup>18</sup> See *John v. Douglas Cnty. Sch. Dist.*, 219 P.3d 1276, 1282 (Nev. 2009) (“Nevada’s anti-SLAPP statute filters unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuits arising from their right to free speech under both the Nevada and Federal Constitutions.”).

combat that uncertainty, anti-SLAPP statutes make explicit their applicability to specific individuals, activities, and subject matter.

## II. SOURCES OF UNCERTAINTY IN ANTI-SLAPP LAW

The wide variation among the protection afforded litigants by existing state anti-SLAPP statutes and the absence of anti-SLAPP legislation in many jurisdictions are inconsistent with the certainty essential to the effective deterrence of SLAPPs.<sup>19</sup> If individuals and groups are unsure whether their petitioning activities will be protected by an anti-SLAPP measure, its ability to mitigate the suits' chilling effect on public participation will be negligible. The absence of federal anti-SLAPP law compounds the problem of uncertainty associated with the availability of anti-SLAPP immunity, and until federal anti-SLAPP legislation is adopted, state legislatures will be left to respond to the central causes of uncertainty associated with anti-SLAPP law—availability, validity, applicability, and appealability.<sup>20</sup>

### A. Availability

The absence of anti-SLAPP legislation in a forum not only deprives its citizens of protection from frivolous and abusive litigation, but also—and perhaps more significantly—adds to the problem of uncertainty among litigants which arises from the states' fragmented approach to anti-SLAPP protection. This is best illustrated by the operation of state anti-SLAPP laws in federal diversity cases, as well as the treatment of purported SLAPPs in jurisdictions, both state and federal, without statutory measures in place.

#### 1. *The Federal Forum*

The certainty with which litigants view anti-SLAPP protections is further diminished by the division among federal courts with respect to their willingness to apply state anti-SLAPP law.<sup>21</sup> Courts have generally treated

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<sup>19</sup> See *Containment Techs. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists*, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549, at \*6 (S.D. Ind. Mar. 26, 2009) ("The parties' dispute over choice of law is based primarily on the differences between the Indiana and Maryland anti-SLAPP statutes.").

<sup>20</sup> Brooke Goldstein & Aaron Eitan Meyer, "Legal Jihad": *How Islamist Lawfare Tactics Are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395, 398–99 ("The problem . . . with Anti-SLAPP statutes is threefold—not all states have enacted them, there is no federal equivalent, and one must wait to be sued in order to take advantage of them.").

<sup>21</sup> For discussion of the variation among courts' *Erie* analyses involving state anti-SLAPP statutes and a proposed analytical solution, see John A. Lynch, Jr., *Federal*

the operation of state anti-SLAPP statutes as procedural rather than substantive and, accordingly, have declined to apply the statutes in federal actions.<sup>22</sup> The Massachusetts district court, for instance, indicated a conflict between the Massachusetts anti-SLAPP law and the Federal Rules of Civil Procedure,<sup>23</sup> and Maine's district court, upon reviewing the Maine anti-SLAPP statute, echoed this conclusion.<sup>24</sup> The Ninth Circuit, in contrast, has allowed defendants in federal diversity actions involving state claims to invoke the California and Oregon anti-SLAPP statutes,<sup>25</sup> and federal district courts in Georgia,<sup>26</sup> Indiana,<sup>27</sup> and Utah<sup>28</sup> have followed, applying their

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*Procedure and Erie: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 316–27 (2008).

<sup>22</sup> Daerr-Bannon, *supra* note 4, at 330.

<sup>23</sup> *Stuborn Ltd. P'ship. v. Bernstein*, 245 F. Supp. 2d 312, 316 (D. Mass. 2003) (declining to apply the Massachusetts anti-SLAPP statute because “[its] special motion provision is predominantly procedural in nature, and . . . it directly conflicts with the Federal Rules of Procedure.”); *Baker v. Coxe*, 940 F. Supp. 409, 417 (D. Mass. 1996) (“[T]his Court will examine the allegations of the complaint under the well-worn standards governing Fed.R.Civ.P. 12(b)(6) motions, not the hybrid statutory procedure in section 59H which is more akin to a summary judgment motion.”); *see also* *Godin v. School Union 134*, Civ. No. 09-77-B-W, 2009 WL 1686910, at \*4 (D. Me. June 16, 2009) (“[T]he district courts in Massachusetts are in consensus that [Massachusetts’s anti-SLAPP statute] is procedural and that special motions to dismiss are not permissible in federal litigation.”).

<sup>24</sup> *Godin*, 2009 WL 1686910, at \*5 (“Following the consensus of the Massachusetts District Court . . . I conclude that the manner that the Maine anti-SLAPP statute contemplates these special motions being presented with competing declarations and a shifting burden conflicts with the Federal Rules of Civil Procedure governing motions to dismiss and motions for summary judgment.”).

<sup>25</sup> *See* *Thomas v. Fry’s Elec., Inc.*, 400 F.3d 1206, 1206–07 (9th Cir. 2005) (reaffirming *Lockheed’s* holding that the motion to strike and fee provisions of California’s anti-SLAPP statute are available to litigants in federal court, but acknowledging that heightened pleading standards may not be imposed in federal forums); *United States v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972–73 (9th Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000) (holding that California’s anti-SLAPP procedure does not conflict with Federal Rules of Civil Procedure 8, 12, and 56 and may be applied in federal court); *see also* *Gardner v. Martino*, 563 F.3d 981, 991 (9th Cir. 2009) (holding that the Oregon anti-SLAPP statute’s requirement that offending claims be dismissed without prejudice does not conflict with Federal Rule 15(a)); *Verizon Del., Inc. v. Covad Commc’ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (“If the offending claims remain in the first amended complaint, the anti-SLAPP remedies remain available to defendants.”); *Card v. Pipes*, 398 F. Supp. 2d 1126, 1136–37 (D. Or. 2004) (following the Ninth Circuit and applying Oregon’s anti-SLAPP procedure in a diversity case).

<sup>26</sup> *See, e.g.,* *Buckley v. DirecTV, Inc.*, 276 F. Supp. 2d 1271, 1275 n.5 (N.D. Ga. 2003) (following the Ninth Circuit and concluding that the Georgia anti-SLAPP statute is available to litigants in federal court). *But see* *Adventure Outdoors, Inc. v. Bloomberg*, 519 F. Supp. 2d 1258, 1278 (N.D. Ga. 2007) (“[T]he court will not apply the *procedural*

respective states' anti-SLAPP laws.<sup>29</sup> It is not yet clear whether the Ninth Circuit would apply state anti-SLAPP statutes to federal question cases, although existing authority suggests that it would not.<sup>30</sup> A number of other federal courts have explicitly declined to hear anti-SLAPP motions made pursuant to state statutes in federal question cases,<sup>31</sup> while certain state courts

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aspects of Georgia's anti-SLAPP statute to this litigation, and the court finds that any failure of Plaintiffs to 'verify' their complaint under the requirements of [Georgia's anti-SLAPP statute] is not grounds for dismissal in federal court.") (emphasis added).

<sup>27</sup> See *Containment Techns. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists*, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549, at \*8 (S.D. Ind. Mar. 26, 2009) (refuting the assertion that the Indiana anti-SLAPP statute conflicted with Federal Rule 56 and was, accordingly, inapplicable: "[T]he anti-SLAPP statute has a distinctly substantive flavor. . . . [It] provides a complete defense to defamation and also provides the remedy of attorney fees to a victorious defendant. These are substantive provisions of Indiana law that govern in this diversity jurisdiction case."). *But cf.* *Nixon v. Haag*, No. 1:08-cv-00648-LJM-JMS, 2009 WL 2026343, at \*3 (S.D. Ind. July 7, 2009) ("[T]he [Indiana] Anti-SLAPP Act's statutory stay of discovery conflicts with [Rule 26 of] the Federal Rules of Civil Procedure.").

<sup>28</sup> *USANA Health Scis., Inc. v. Minkow*, No. 2:07-cv-159 TC, 2008 WL 619287, at \*2 (D. Utah Mar. 4, 2008) (applying the California anti-SLAPP statute in a federal diversity case, reasoning that the statute did not conflict with the Federal Rules and that its application would support "significant state interests furthered by the anti-SLAPP statutes" without threatening any federal interests).

<sup>29</sup> Federal courts outside of California have also followed the Ninth Circuit in applying California's anti-SLAPP law in federal court. *See, e.g., Price v. Stossel*, No. 07 Cv. 11364(SWK), 2008 WL 2434137, at \*6 (S.D.N.Y. June 4, 2008) ("The Court follows the Ninth Circuit Court of Appeals, which has concluded that the motion-to-strike provision of the California Anti-SLAPP Statute is substantive, and thus applicable to a federal court sitting in diversity.").

<sup>30</sup> *See In re Bah*, 321 B.R. 41, 46, 47 (B.A.P. 9th Cir. 2005) (noting that "[w]hile the Ninth Circuit has held that the anti-SLAPP statute applies in diversity actions . . . it has not decided whether it applies in cases involving federal question jurisdiction and holding that "the anti-SLAPP statute is inapplicable to federal claims").

<sup>31</sup> *See South Middlesex Opportunity Council, Inc. v. Town of Framingham*, Civ. No. 07-12018-DPW, 2008 WL 4595369, at \*9 (D. Mass. Sept. 30, 2008); *Kearney v. Foley & Lardner*, 553 F. Supp. 2d 1178, 1183 (S.D. Cal. 2008) ("Where a complaint contains both anti-SLAPP and non-anti-SLAPP causes of action, *e.g.*, federal claims, the SLAPP claims alone may be stricken and a motion to dismiss may be directed to the non-SLAPP causes of action."); *Summit Media LLC v. City of L.A., Cal.*, 530 F. Supp. 2d 1084, 1094 (C.D. Cal. 2008) ("[T]he [state] anti-SLAPP statute does not apply to federal question claims in federal court because such application would frustrate substantive federal rights."); *Yeshiva Chofetz Chaim Radin, Inc. v. Vill. of New Hempstead*, 98 F. Supp. 2d 347, 360 (S.D.N.Y. 2000) (holding that the New York anti-SLAPP statute does not apply in federal question cases); *Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999) (Defendant's argument "that the anti-SLAPP statute should be applied to federal question claims . . . is not supported by the *Erie* rationale articulated in the *Lockheed* decision or by any other authority of which the

have allowed anti-SLAPP motions to proceed where federal claims are heard in state court. The Nevada Supreme Court, for instance, has concluded that the state's anti-SLAPP statute applies to federal claims "because it is a neutral and procedural statute that does not undermine any federal interests."<sup>32</sup>

Those federal courts which have applied state anti-SLAPP statutes have noted the importance of reconciling the laws with applicable Federal Rules of Civil Procedure.<sup>33</sup> The Ninth Circuit, for instance, has applied California's state anti-SLAPP language governing the availability of the special motion and the award of attorney's fees,<sup>34</sup> but has rejected the statute's "discovery-limiting aspects"<sup>35</sup> and amendment restrictions<sup>36</sup> as inconsistent with the Federal Rules. Following similar reasoning, a Georgia district court, rejecting its own precedent,<sup>37</sup> declined to apply the state's anti-SLAPP law in a

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Court is aware. Consequently, the Court concludes that the anti-SLAPP statute is not applicable to the federal claims . . .").

<sup>32</sup> *John v. Douglas Cnty. Sch. Dist.*, 219 P.3d 1276, 1279 (Nev. 2009).

<sup>33</sup> *See, e.g., Am. Nat'l Red Cross v. United Way Cal. Capital Region*, No. CIV. S-07-1236 WBS DAD, 2008 WL 2302188, at \*3 (E.D. Cal. May 30, 2008) (citing *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003)) ("While [m]otions to strike a state law claim under California's anti-SLAPP statute may be brought in federal court, the *Erie* doctrine dictates which of the statute's subdivisions apply in federal court." (internal quotation marks omitted)).

<sup>34</sup> *See United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999).

<sup>35</sup> *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001). A California court, discussing the "[s]pecial procedural rules [that] apply where an anti-SLAPP motion is brought in federal court," explained that the court should treat an anti-SLAPP motion arising from a plaintiff's failure to provide evidence to support its claim as a motion for summary judgment. *Lauter v. Anoufrieve*, 642 F. Supp. 2d 1060, 1109 (C.D. Cal. 2009). Summary judgment will be unavailable in such circumstances unless the plaintiff has had a sufficient opportunity to conduct discovery; to allow a defendant to demand that a plaintiff present evidence prior to discovery would be inconsistent with Federal Rule 56. *Id.*; *see also Containment Techs. Grp., Inc. v. Am. Soc'y of Health Sys. Pharmacists*, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549, at \*8 (S.D. Ind. Mar. 26, 2009) ("The court applies both Rule 56 of the Federal Rules of Civil Procedure and the substantive portions of the Indiana Anti-SLAPP statute . . .").

<sup>36</sup> *Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) ("[G]ranteeing a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment.").

<sup>37</sup> *Adventure Outdoors, Inc. v. Bloomberg*, 519 F. Supp. 2d 1258, 1278 n.8 (N.D. Ga. 2007) ("The court is aware that in *Buckley v. DIRECTV, Inc.*, 276 F. Supp. 2d 1271, 1275 n.5 (N.D. Ga. 2003) . . . the court, applying the Ninth Circuit precedent, found that there was no *Erie* conflict between the Federal Rules and the procedural aspects of Georgia's anti-SLAPP statute. . . . The court disagrees with [this] analysis . . .").



diversity case, concluding that the statute's heightened pleading requirements for plaintiffs conflict with Federal Rule 8(a), and refused to dismiss plaintiffs' claims despite their failure to verify the complaint, as required by the state statute.<sup>38</sup>

Disparate judicial interpretations of anti-SLAPP laws and their applicability in federal forums further exacerbate the problem of uncertainty arising from inconsistencies among various jurisdictions' anti-SLAPP remedies. The efficacy of anti-SLAPP measures in achieving their purpose depends largely upon the certainty with which citizens view the laws' protections; the enactment of an anti-SLAPP statute will do little to mitigate the chilling of public participation associated with the risk of SLAPPs unless those who would otherwise be silenced are sufficiently confident that, in the case of retaliatory lawsuits, they will be able to avoid burdensome litigation. While uniformity among state laws would restrain forum shopping in some instances, the availability of a federal anti-SLAPP measure would provide additional deterrence to forum shopping and, more generally, to the filing of SLAPPs. Although there is presently no federal anti-SLAPP statute, the problem of SLAPPs has been, if only nominally, placed on Congress's agenda. The Citizen Participation Act of 2009<sup>39</sup> was introduced in the U.S. House of Representatives on December 16, 2009, and has been referred to the House Committee on the Judiciary. Democratic Congressman Steve Cohen, who represents Tennessee's Ninth District and authored the state's anti-SLAPP law, introduced the bill.<sup>40</sup> Like state anti-SLAPP statutes, the bill is designed to reinforce First Amendment protections,<sup>41</sup> ensure public participation in government,<sup>42</sup> promote judicial economy,<sup>43</sup> and protect the

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<sup>38</sup> See *id.* at 1270.

<sup>39</sup> H.R. 4364, 111th Cong. (2009) ("To protect [F]irst [A]mendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called "SLAPPs", and for other purposes.").

<sup>40</sup> TENN. CODE ANN. §§ 4-21-1001-4-21-1004 (LexisNexis 2010).

<sup>41</sup> "[T]he framers of our Constitution, recognizing participation in government and freedom of speech as inalienable rights essential to the survival of democracy, secured their protection through the First Amendment to the United States Constitution." H.R. 4364, 111th Cong. § 2 (2009).

<sup>42</sup> "[T]he communications, information, opinions, reports, testimony, claims and arguments that individuals, organizations and businesses provide to the government are essential to wise government decisions and public policy, the public health, safety, and welfare, effective law enforcement, the efficient operation of government programs . . . and the continuation of America's representative democracy." *Id.*

<sup>43</sup> "SLAPPs are an abuse of the judicial process that waste judicial resources and clog the already over-burdened court dockets." *Id.*

public from the potentially devastating impacts of SLAPPs.<sup>44</sup> The statute's findings also acknowledge what is perhaps the proposed statute's most significant goal—to provide uniform protection against SLAPPs. Such uniformity would not only broaden the scope of anti-SLAPP law by closing existing gaps in the availability of protection, but also discourage forum shopping among SLAPP plaintiffs.<sup>45</sup>

## 2. Judicial Remedies

In the absence of statutory provisions, state and federal judiciaries have, in some cases, developed their own approaches to the resolution of SLAPPs. These courts rely on the federal *Noerr-Pennington* doctrine or, alternatively, apply state judicial doctrine governing anti-SLAPP motions where such doctrine has been established.

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<sup>44</sup> “[T]he threat of financial liability, litigation costs, destruction of one’s business, loss of one’s home, and other personal losses from groundless lawsuits seriously impacts government, interstate commerce, and individual rights by significantly chilling public participation in government, public issues, and in voluntary service.” *Id.*

<sup>45</sup> “[W]hile some courts and State legislatures have recognized and discouraged SLAPPs, protection against SLAPPs has not been uniform or comprehensive.” *Id.* The Ninth Circuit, holding that California’s anti-SLAPP law is applicable in federal court, noted the risk of forum shopping; the court reasoned that:

[T]he twin purposes of the *Erie* rule—“discouragement of forum-shopping and avoidance of inequitable administration of the law”—favor application of California’s Anti-SLAPP statute in federal cases. Although [Federal] Rules [of Civil Procedure] 12 and 56 allow a litigant to test the opponent’s claims before trial, California’s “special motion to strike” adds an additional, unique weapon to the pretrial arsenal, a weapon whose sting is enhanced by a[n] entitlement to fees and costs. Plainly, if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum. Conversely, a litigant otherwise entitled to the protections of the Anti-SLAPP statute would find considerable disadvantage in a federal proceeding. This outcome appears to run squarely against the “twin aims” of the *Erie* doctrine.

United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 973 (9th Cir. 1999) (citations omitted); *see also* Bible & Gospel Trust v. Twinam, No. 2:07-CV-17, 2008 WL 5216845, at \*2 (D. Vt. July 18, 2008) (summarizing the Ninth Circuit’s reasoning: “Under *Hanna*, (1) allowing the anti-SLAPP statute would discourage forum shopping as plaintiffs would ‘shop’ for a federal forum to avoid the California law, and (2) California defendants would be at a disadvantage against out-of-state plaintiffs because they would lose the protections of the anti-SLAPP statute.”); Price v. Stossel, No. 07 Cv. 11364(SWK), 2008 WL 2434137, at \*7 (S.D.N.Y. June 4, 2008) (“[Plaintiff] apparently decided to refile his action, which was initially brought in California, in order to avoid the immediate-appeal provision of California’s anti-SLAPP statute. In light of . . . [his] apparent strategic refiling in this District, the Court accords no weight to [plaintiff]’s most recent choice of forum.” (citation omitted)).

a. *The Noerr-Pennington Doctrine*

Until a federal statutory remedy becomes available—which, some speculate, will be later rather than sooner—litigants who believe they have been “SLAPped” must rely on a judicial remedy: the *Noerr-Pennington* doctrine. The doctrine, which arose from a pair of Supreme Court cases involving antitrust claims, represents the Court’s articulation of the broad immunity from suit granted to petitioning activities. The *Noerr* Court, addressing truck operators’ assertion that railroad operators’ campaign to influence state legislators was designed to render truck operators unable to effectively compete with train operators in the freight transport business,<sup>46</sup> concluded that “[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.”<sup>47</sup> The Court reiterated this conclusion four years later in *Pennington*,<sup>48</sup> and went on to explain the limited “sham” exception to the doctrine’s broad immunity, explicitly removing from its protection petitioning activities that are not intended to affect government decision-making, and which have the sole purpose of causing harm to the alleged SLAPper.<sup>49</sup> While motive is

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<sup>46</sup> E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129 (1961).

<sup>47</sup> *Id.* at 139; see also United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669 (1965) (“Nothing could be clearer from the [*Noerr*] Court’s opinion than that anticompetitive purpose did not illegalize the conduct there involved.”).

<sup>48</sup> *Pennington*, 381 U.S. at 670 (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.”).

<sup>49</sup> See Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972) (“[T]here may be instances where the alleged conspiracy ‘is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.’” (quoting *Noerr*, 365 U.S. at 144)). The Court further articulated the contours of the sham exception in a subsequent antitrust decision:

The sham exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so *through improper means*.

City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380 (1991) (internal quotation marks and citations omitted) (rejecting a proposed conspiracy exception to the

inapposite to the sham determination, in the sense that a proceeding that is genuinely intended to influence government action will not be treated as a sham, even where that government action is desired primarily for its anticipated negative impact on competitors, petitioning activity that is undertaken with the sole purpose of causing harm to competitors by way of process rather than outcome will not be subject to *Noerr-Pennington* immunity.<sup>50</sup> The Supreme Court further clarified the doctrine, “reject[ing] a purely subjective definition of ‘sham[]’ [because] [t]he sham exception so construed would undermine, if not vitiate, *Noerr*,”<sup>51</sup> and established a two-part analysis, involving both objective and subjective elements, for identifying cases that fall within the exception:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the

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*Noerr-Pennington* doctrine); see also Daerr-Bannon, *supra* note 4, at 325 (“If the [petitioning] activity was engaged in not to affect governmental action but to harass and deter others from having ‘free and unlimited access’ to agencies and courts, then there is an abuse of administrative and judicial process . . .”). *Omni* effectively narrowed the sham exception, consistent with the doctrine’s purpose of preserving the right of petition. *Id.* at 348 (“[T]he ‘sham’ exception was fully developed in *Omni*, a decision looked upon by SLAPP targets as generally favorable and very definitively limiting and narrowing the ‘sham’ exception.”).

<sup>50</sup> *Cal. Motor*, 404 U.S. at 510–11; see Christopher L. Sagers, *The Legal Structure of American Freedom and the Provenance of the Antitrust Immunities*, 2002 UTAH L. REV. 927, 948 (2002) (discussing the influence of the *Noerr* line of cases on SLAPP jurisprudence and noting that “[t]he SLAPP phenomenon can be blamed in part on *California Motor*’s misguided dicta”). It has been suggested that:

It would be an advantage to SLAPP activists and the like if they sought only general First Amendment protection against legal retaliation and just gave up on the petitioning immunity. Unlike the antitrust doctrine, modern First Amendment doctrine well recognizes the significance of distinguishing between commercial expression, on the one hand, and more purely political conduct with more legitimate and important claims to freedom on the other hand. Thus, the modern Court has consistently held that First Amendment protections of political speech and association vary depending on the character of the expressive actor. Businesses and commercial groups cannot cloak self-interested and financially motivated conduct in the same impenetrable protection as that which protects, say, civil rights activism. This is a good thing, too, given the power and incentive for abuse often held by such actors.

*Id.* at 957.

<sup>51</sup> *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60–61 (1993).

litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor" through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon."<sup>52</sup>

In the absence of contrary statutory language, the sham defense, though limited,<sup>53</sup> is the primary mechanism by which a party whose claim has been identified as a SLAPP may avoid dismissal.<sup>54</sup>

In the decades following *Noerr* and *Pennington*, the federal courts extended *Noerr*'s principle to cases outside of antitrust law<sup>55</sup>—including

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<sup>52</sup> *Id.* at 60–61 (citations omitted) (establishing a two-part definition for cases that fall within the sham exception to the *Noerr-Pennington* doctrine and applying it in an antitrust context). The Court emphasized that the exception from the *Noerr-Pennington* doctrine eliminates just one of a number of hurdles that a plaintiff must clear in order to prevail, adding to its conclusion the caveat that "[p]roof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim." *Id.* at 61.

<sup>53</sup> The sham exception is narrow in scope, and may effectively be invoked only in a limited set of circumstances. See Daerr-Bannon, *supra* note 4, at 348 ("Once the claim is properly defined as a SLAPP, the SLAPPER must establish that no genuine petitioning activity exists (and the case law *defines such activity broadly*) in order to defeat early and sure dismissal of the claim." (emphasis added)).

<sup>54</sup> *Id.* at 347 ("Once a claim is acknowledged by the court to be a SLAPP, the only real defense available will be the 'sham' exception. Immunity for the SLAPP target will generally be absolute . . .").

<sup>55</sup> See *DirecTV, Inc. v. Milliman*, No. 02-74829, 2003 WL 23892683, at \*7 (E.D. Mich. Aug. 26, 2003) ("As a First Amendment doctrine, [*Noerr-Pennington*] immunity extends beyond antitrust claims." (citing *Pennwalt Corp. v. Zenith Lab., Inc.*, 472 F. Supp. 413, 424 (E.D. Mich. 1979))); *Webb v. Fury*, 282 S.E.2d 28, 36 (W. Va. 1981) ("[I]t is apparent that the foundation of the [*Noerr-Pennington*] doctrine, and of the sham exception rests upon solid First Amendment grounds rather than upon a limited construction of the Sherman Act."); Daerr-Bannon, *supra* note 4, at 326 ("[The *Noerr-Pennington*] line of cases exclusively involves antitrust allegations. However, . . . lower courts have not been reluctant at all to apply the principles enunciated beyond the antitrust arena, and . . . [t]he U.S. Supreme Court appears to have acknowledged that the . . . doctrine has a broader application than simply to antitrust litigation."). Despite this general acceptance, the application of the *Noerr-Pennington* doctrine outside of the anti-SLAPP context has not escaped criticism. See, e.g., Joseph W. Beatty, *The Legal Literature on SLAPPs: A Look Behind the Smoke Nine Years After Pring and Canan First Yelled "Fire!"*, 9 U. FLA. J.L. & PUB. POL'Y 85, 101–03 (1997) (criticizing courts' reliance on *Proff'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) to support the extension of *Noerr-Pennington* doctrine to cases outside of antitrust law); Mark J. Sobczak, *SLAPPED in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. ILL. U. L. REV. 559, 569 (2007) ("[W]hile various federal courts, including the Supreme Court, have used the logic of *Noerr-Pennington* beyond its

abuse of process,<sup>56</sup> tortious interference,<sup>57</sup> and other causes of action commonly used to disguise SLAPPs<sup>58</sup>—further reinforcing the protections granted to petitioning activities. In more recent years, the doctrine has emerged as a foundational element of both case law and commentary discussing SLAPPs and anti-SLAPP legislation.<sup>59</sup> Anti-SLAPP measures, like the *Noerr-Pennington* doctrine, have as their principal purpose the protection of petitioning and speech rights articulated in state and federal constitutions.<sup>60</sup> In light of this common purpose, legislatures have looked to the *Noerr-Pennington* doctrine as a guide for the development of state anti-SLAPP statutes,<sup>61</sup> and the sham exception has been recognized by courts in jurisdictions both with<sup>62</sup> and without<sup>63</sup> anti-SLAPP measures.<sup>64</sup>

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antitrust origins, the propriety of doing so has been vigorously criticized.” (footnotes omitted)).

<sup>56</sup> See, e.g., *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159–61 (3d Cir. 1988).

<sup>57</sup> See, e.g., *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983); *Virtual Works, Inc. v. Network Solutions, Inc.*, No. CRIM. A. 99-1289-A, 1999 WL 1074122, at \*1 (E.D. Va. 1999).

<sup>58</sup> *Balt. Scrap Corp. v. David J. Joseph Co.*, 81 F. Supp. 2d 602, 620 (D. Md. 2000), *aff’d*, 237 F.3d 394 (4th Cir. 2001) (“Because the defendants’ behavior is protected from antitrust liability by the First Amendment under *Noerr-Pennington*, it is likewise protected from state common law liability.”).

<sup>59</sup> *Guam Greyhound, Inc. v. Brizill*, No. CVA07-021, 2008 WL 4206682, at \*6 n.8 (Guam Sept. 11, 2008) (“*Noerr* and *Pennington* and the doctrine and cases they spawned have been used to develop model SLAPP laws . . .”).

<sup>60</sup> See, e.g., *United States v. Hempling*, 431 F. Supp. 2d 1069, 1084 n.8 (E.D. Cal. 2006) (“[T]he *Noerr-Pennington* doctrine is a cousin to modern Anti-Slapp statutes.”); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 61 (R.I. 1996) (“Like the *Noerr-Pennington* doctrine, the [Rhode Island] anti-SLAPP statute was adopted in order to protect valid petitioning activities.”). Acknowledging the parallel principles underlying the *Noerr-Pennington* doctrine and state anti-SLAPP laws, courts have relied on *Noerr-Pennington* jurisprudence to guide their anti-SLAPP decisions. See, e.g., *Milliman*, 2003 WL 23892683, at \*7 (“DirecTV argues that all of Milliman’s counterclaims are barred under the *Noerr-Pennington* doctrine . . . [O]ther lawsuits involving DirecTV have been dismissed based on similar state anti-SLAPP laws.”).

<sup>61</sup> In fact, Rhode Island’s legislature amended the state’s anti-SLAPP measure in 1995 to more clearly conform to the sham standard under the *Noerr-Pennington* doctrine. R.I. GEN. LAWS § 9-33-2 (1997); *Hometown Props.*, 680 A.2d at 62; see also *LoBiondo v. Schwartz*, 970 A.2d 1007, 1020 (N.J. 2009) (“[T]he majority of the [state anti-SLAPP] statutes find their roots in the United States Supreme Court’s *Noerr-Pennington* doctrine, creating immunity that protects actions that fall within the parameters of the redress of one’s grievances to the government.”).

<sup>62</sup> Some courts have relied on *Noerr-Pennington* case law in interpreting their respective states’ anti-SLAPP statutes, recognizing *Noerr* and its progeny as a guide for both development and analysis of anti-SLAPP laws. See, e.g., *Alves v. Hometown Newspapers, Inc.*, No. CIV.A.2001-1030, 2002 WL 475282, at \*7 (R.I. Super. Ct. Mar.

### b. *State Judicial Doctrines*

State legislatures that have not developed anti-SLAPP statutes have, in many cases, had the issue brought to their attention. Public interest organizations are not the only source of support for anti-SLAPP measures; a Wisconsin Supreme Court Justice, discussing the challenges associated with disposing of SLAPPs, suggested that “[t]he legislature . . . consider the experience of other states that have enacted anti-SLAPP statutes and consider adopting legislation modeled upon the anti-SLAPP statutes in states like California and Massachusetts [because] . . . [t]he potential for the strategic abuse of legal process is real.”<sup>65</sup> Courts have, in some instances, noted that the absence of anti-SLAPP legislation has tied their hands with respect to solving the SLAPP problem, while others have looked to the jurisprudence of states that have established a statutory remedy.<sup>66</sup> A Connecticut court, noting the absence of state anti-SLAPP legislation, decided a motion for summary judgment arising from a purported SLAPP by using as guidance a series of Rhode Island decisions construing that state’s anti-SLAPP law.<sup>67</sup> Other

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14, 2002) (“The [Rhode Island] anti-SLAPP statute emulates the federal *Noerr-Pennington* doctrine . . . . The Rhode Island Supreme Court has adopted the *Noerr-Pennington* doctrine and has applied it to tort cases.” (footnotes omitted)); *Brizill*, 2008 WL 4206682, at \*9 (“Because section 17104 [of Guam’s anti-SLAPP statute] spells out what is covered by [*Omni*], we turn to that case to explain section 17104’s sham exception.” (internal quotation marks omitted)).

<sup>63</sup> See Daerr-Bannon, *supra* note 4, at 351 (“If no precedent or statute has yet been recognized in the jurisdiction, counsel will seek to have the Court apply *Noerr-Pennington* and develop procedures for quick and early dismissal consistent with *Omni*.”).

<sup>64</sup> A number of courts, in interpreting their respective states’ anti-SLAPP statutes, have explicitly relied on *Noerr* and its progeny as a guide. See, e.g., *Ludwig v. Superior Court of Riverside Cnty.*, 43 Cal. Rptr. 2d 350, 360 (Cal. Ct. App. 1995); *Margolis v. Gosselin*, No. CIV. A. 95-03837-A, 1996 WL 293481, at \*3 (Mass. Super. Ct. May 22, 1996); see also *LoBiondo v. Schwartz*, 733 A.2d 516, 532 (N.J. Super. Ct. App. Div. 1999) (describing pending state anti-SLAPP legislation that would “afford[] a litigation immunity for citizens who make bona fide communications to a public entity regarding matters of public interest with which they are concerned—in other words, the *Noerr-Pennington approach*” (emphasis added)).

<sup>65</sup> *Lassa v. Rongstad*, 718 N.W.2d 673, 710 (Wis. 2006) (Prosser, J., dissenting) (citations omitted).

<sup>66</sup> See, e.g., *TES Franchising, LLC v. Feldman*, 943 A.2d 406, 413 n.10 (Conn. 2008) (“The [lower] court rejected the defendant’s SLAPP suit defense because Connecticut has no anti-SLAPP statute and this is a statutory cause of action in other jurisdictions.”).

<sup>67</sup> *Zeller v. Consolini*, No. CV 920060356S, 1999 WL 99192, at \*5 (Conn. Super. Ct. Feb. 17, 1999).

courts have declined to determine the availability of anti-SLAPP remedies,<sup>68</sup> while still others have held that viable alternatives to the problem of SLAPPs exist, framing their analyses by comparing the remedies afforded by anti-SLAPP laws with their respective judicial remedies.<sup>69</sup>

Even where anti-SLAPP measures have been placed on the legislative agenda, proponents have encountered significant obstacles to the passage of corresponding legislation. South Carolina's legislature most recently began consideration of an anti-SLAPP measure; the bill was introduced to the state house of representatives and referred to the Committee on the Judiciary on February 19, 2009, but no action has since been taken.<sup>70</sup> Similarly, anti-SLAPP legislation has been introduced in nine states<sup>71</sup> that are presently

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<sup>68</sup> AVB Props., LLC v. Chesler, No. 05CA008702, 2006 WL 2390243, at \*4 (Ohio Ct. App. Aug. 21, 2006) (declining to reverse a trial court's grant of a directed verdict on a SLAPP cause of action, noting that the "Court takes no stance on whether SLAPP actions are cognizable under Ohio law").

<sup>69</sup> See, e.g., *Zeller*, 1999 WL 99192, at \*7 ("Our legislature may not have promulgated anti-SLAPP legislation[,] . . . nor has our Supreme Court expressly applied the Noerr Pennington doctrine, but our common law of vexatious litigation is well established as is our adherence to constitutional principles reflected in the Noerr Pennington doctrine."); *LoBiondo*, 970 A.2d at 1012 ("[O]ur common law cause of action for malicious use of process, although a disfavored one, is a viable response to a SLAPP suit . . ."); *Tri-County Concrete Co. v. Uffman-Kirsch*, No. 76866, 2000 WL 1513696, at \*6 (Ohio Ct. App. Oct. 12, 2000) ("The Ohio General Assembly has not yet chosen to enact anti-SLAPP legislation, and this court is constrained from recognizing such an action at this time. Beside, any party faced with this kind of lawsuit may avail herself of the frivolous lawsuit statute, which affords to the grievant ample relief . . .").

<sup>70</sup> H.R. 3587, 118th Leg., Reg. Sess. (S.C. 2009).

<sup>71</sup> Colorado (H.R. 1192, 63d Leg., 2d Reg. Sess. (Colo. 2002); H.R. 01-1150, 63d Leg., 1st Reg. Sess. (Colo. 2001)); Connecticut (H.R. 7374, 1991 Leg., Reg. Sess. (Conn. 1991); H.R. 1026, 1993 Leg., Reg. Sess. (Conn. 1993); S. 182, 1993 Leg., Reg. Sess. (Conn. 1993); S. 248, 1993 Leg., Reg. Sess. (Conn. 1993)); Kansas (S. 287, 1997 Leg., Reg. Sess. (Kan. 1997)); Michigan (H.R. 5036, 2009 Leg., Reg. Sess. (Mich. 2009); H.R. 6394, 2008 Leg., Reg. Sess. (Mich. 2008); S. 1195, 2004 Leg., Reg. Sess. (Mich. 2004); H.R. 5592, 2002 Leg., Reg. Sess. (Mich. 2002); H.R. 4709, 1997 Leg., Reg. Sess. (Mich. 1997)); New Hampshire (S. 661, 1994 Leg., Reg. Sess. (N.H. 1994)); New Jersey (S. 745, 208th Leg., Reg. Sess. (N.J. 1998); Gen. Assem. 1788, 208th Leg., Reg. Sess. (N.J. 1998); Gen. Assem. 1545, 207th Leg., Reg. Sess. (N.J. 1996); S. 643, 207th Leg., Reg. Sess. (N.J. 1996)); South Carolina (H.R. 3587, 2009 Leg., Reg. Sess. (S.C. 2009)); Texas (H.R. 1089, 80th Leg., Reg. Sess. (Tex. 2007); H.R. 1130, 2007 Leg., Reg. Sess. (Tex. 2007); H.R. 329, 2005 Leg., Reg. Sess. (Tex. 2005); H.R. 2267, 2003 Leg., Reg. Sess. (Tex. 2003); H.R. 1834, 2001 Leg., Reg. Sess. (Tex. 2001); H.R. 2723, 2001 Leg., Reg. Sess. (Tex. 2001); H.R. 2488, 1999 Leg., Reg. Sess. (Tex. 1999); H.R. 1319, 1997 Leg., Reg. Sess. (Tex. 1997)); Virginia (S. 424, 1992-1993 Leg., Reg. Sess. (Va. 1992)). For additional information on these bills, as well as an overview of existing anti-SLAPP legislation, see CALIFORNIA ANTI-SLAPP PROJECT, <http://www.casp.net/statutes/menstate.html> (last visited Nov. 7, 2010).



without statutory remedies for SLAPPs and, in a few of those states, it has been rejected more than once. In Texas, for instance, eight different measures were introduced between 1995 and 2009, but the state has yet to pass an anti-SLAPP law. Texas's experience is illustrative of the general challenges associated with the adoption of anti-SLAPP measures: some proposed statutes were rejected early in the legislative process,<sup>72</sup> while others failed to reach enactment because of political disparities between the two houses of the state's legislature,<sup>73</sup> inconsistencies between legislative and executive priorities, and the precedence assigned to other legislative efforts.<sup>74</sup> Only one of these bills<sup>75</sup> has reached the governor, who summarily vetoed the measure, objecting to its impact on the role of the courts and the responsibilities of attorneys.<sup>76</sup>

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<sup>72</sup> Neither H.R. 329, 79th Leg., Reg. Sess. (Tex. 2005) nor H.R. 1834, 77th Leg., Reg. Sess. (Tex. 2001) passed the House Committee on Civil Practices.

<sup>73</sup> H.R. 2723, 77th Leg., Reg. Sess. (Tex. 2001) was approved by both houses of the Texas legislature but was vetoed by the governor; H.R. 2488, 76th Leg., Reg. Sess. (Tex. 1999) passed in the House but failed in the Senate Committee on State Affairs; and H.R. 2967, 74th Leg., Reg. Sess. (Tex. 1995) passed the state house but, like the bill's 1999 counterpart, failed in the senate.

<sup>74</sup> H.R. 2267, 78th Leg., Reg. Sess. (Tex. 2003) was passed by the House Committee on Civil Practices, but was not put to a vote in the house due to the body's focus on redistricting. Similarly, H.R. 1319, 75th Leg., Reg. Sess. (Tex. 1997) survived committee but was not formally addressed by the house, which was under pressure to address the numerous bills pending at the end of the regular session. More recent anti-SLAPP proposals have also been relegated to the legislative backburner. H.R. 1089, 80th Leg., Reg. Sess. (Tex. 2007) was introduced on February 5, 2007, and passed the House Committee on Civil Practices on April 10, 2007; however, no further action has passed since. Similarly, H.R. 1338, 81st Leg., Reg. Sess. (Tex. 2009) was introduced on February 17, 2009, and unanimously passed the House Committee on Judiciary & Civil Jurisprudence on May 1, 2009, but has not since advanced.

<sup>75</sup> H.R. 2723, 77th Leg., Reg. Sess. (Tex. 2001).

<sup>76</sup> "House Bill No. 2723 is a radical departure from traditional concepts of our adversarial justice system and the role of the courts. It also creates new causes of action by holding lawyers liable for the accuracy of information provided to them by their clients." HOUSE RESEARCH ORGANIZATION, FOCUS REPORT, H.R. 77-10, Reg. Sess., at 71 (Tex. 2001). Representative Richard Raymond, who authored the bill, later responded to the governor's concerns about the responsibility placed on attorneys:

HB 2723 does not create a new cause of action against attorneys. They are currently subject to Rule 13 requirements in state courts and Rule 11 requirements in federal courts. A SLAPP plaintiff's lawyer would have knowledge he was suing on account of testimony or information provided in another official proceeding. The bill applies to suits alleging 'that the contents of or the filing of the complaint constitutes a basis for relief . . .'. Even then, the sanctions against a lawyer [would] not [be] automatically applied but would be decided by a judge who must determine that the attorney acted in bad faith, and whose decision on the matter is appealable.

Colorado's legislature has been similarly unsuccessful in enacting anti-SLAPP legislation, and has twice failed to pass proposed bills addressing the matter. The first of these bills<sup>77</sup> failed by a narrow margin in the state house of representatives. During the following year, the house approved a new anti-SLAPP bill, but the bill did not survive the Senate Public Policy and Planning Committee. Although the legislature has declined to take on the problem of SLAPPs, Colorado's judiciary has developed its own approach to managing the frivolous suits. In *Protect Our Mountain Environment, Inc. v. District Court (POME)*,<sup>78</sup> the state's supreme court heard an appeal from a lower court's summary denial of a motion to dismiss a developer's complaint against an environmental group. The developer had filed an application to obtain rezoning for a 507-acre parcel of land near Evergreen, Colorado,<sup>79</sup> and the County Board of Commissioners approved the rezoning and amended the county zoning map. Protect Our Mountain Environment (POME) subsequently filed an action against the Board and the developer under a state procedural rule enabling it to seek relief in the district court "[w]here an inferior tribunal (whether court, board, commission or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law."<sup>80</sup> POME asserted that because the Board failed to account for environmental impacts and acted inconsistently with zoning laws, the rezoning should be overturned.<sup>81</sup> The district and appellate courts ruled against POME, and the appellate court awarded the developer damages and double costs.<sup>82</sup> The developer then filed a complaint alleging that POME's original suit was brought maliciously, seeking compensatory and exemplary damages.<sup>83</sup> POME filed a motion to dismiss, asserting that its Rule 106 suit fell within the First Amendment's protection of petitioning activities.<sup>84</sup> The court, without receiving evidence or making findings, concluded that POME's complaint was a "sham," and was not subject to First Amendment

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*Id.* Currently, because no statutory remedy exists to dispose of SLAPPs, "[t]he most expeditious means for eliminating a SLAPP claim in Texas is to seek traditional summary judgment on the basis of the U.S. and Texas Constitutions." Chad Baruch, *"Slapp"-ed Around: Defending Consumers from Retaliatory Litigation*, 8 J. TEX. CONSUMER L. 36, 37 (2004). However, sanctions are available to SLAPP targets who are granted summary judgment on constitutional grounds. *Id.* at 39.

<sup>77</sup> H.R. 01-1150, 63d Gen. Assemb., Reg. Sess. (Colo. 2001).

<sup>78</sup> 677 P.2d 1361 (Colo. 1984).

<sup>79</sup> *Id.* at 1363.

<sup>80</sup> COLO. R. CIV. P. 106(a)(4).

<sup>81</sup> *POME*, 677 P.2d at 1363-64.

<sup>82</sup> *Id.* at 1364 n.4.

<sup>83</sup> *Id.* at 1364.

<sup>84</sup> *Id.*

immunity.<sup>85</sup> The Colorado Supreme Court, in an opinion carefully reviewing the *Noerr* line of cases and its underlying principles,<sup>86</sup> as well as the limitations of the right to petition, reversed.<sup>87</sup> The supreme court, in reaching its conclusion, explicitly adopted a new rule governing motions to dismiss arising from petitioning activities.<sup>88</sup> According to this rule, the motion should be addressed as a motion for summary judgment and considered according to a heightened standard of review, with the burden of proof shifted to the non-moving party.<sup>89</sup> In addition to adopting these procedural standards, courts considering such motions should, after allowing the parties a “reasonable opportunity to present all material pertinent,” conduct a three-part inquiry:

[W]hen, as here, a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant’s petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant’s administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant’s petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant’s petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.<sup>90</sup>

The court, acknowledging the importance of balancing opposing parties’ First Amendment rights, concluded that this analytical approach “will safeguard the constitutional right of citizens to utilize the administrative and judicial processes for redress of legal grievances without fear of retaliatory litigation and, at the same time, will permit those truly aggrieved by abuse of these processes to vindicate their own legal rights.”<sup>91</sup> As a result of the model’s ability to strike such a balance, *POME*, like the *Noerr* line of cases, has been identified as a model for courts, legislatures, and scholars

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1365–67.

<sup>87</sup> *POME*, 677 P.2d at 1370.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1368–69.

<sup>90</sup> *Id.* at 1369.

<sup>91</sup> *Id.*; George W. Pring & Penelope Canan, “Strategic Lawsuits Against Public Participation” (“SLAPPs”): *an Introduction for Bench, Bar, and Bystanders*, 12 BRIDGEPORT L. REV. 937, 952–53 (1992) (“The POME test removes the normal barriers to early dismissal through its creative identification, burden-shifting, and proof elements. It is a hard test for filers to overcome, but a workable balance between protecting the target’s constitutional Petition Rights and the filer’s personal rights.”).

addressing SLAPPs.<sup>92</sup> Pring and Canan once suggested that “[t]he POME test is a ‘cure’ well worth adopting in other jurisdictions,”<sup>93</sup> and commentators continue to acknowledge the *POME* test’s advantages as a remedy for SLAPPs.<sup>94</sup>

## B. *Validity*

The debate over scope and implementation of anti-SLAPP legislation is meaningless without a preliminary discussion of enforceability. As with other characteristics of anti-SLAPP law, constitutional validity of existing or proposed anti-SLAPP measures varies according to statute and jurisdiction. Among the constitutional concerns most commonly raised in the context of anti-SLAPP law are equal protection and due process.<sup>95</sup>

### 1. *Equal Protection*

State anti-SLAPP statutes have also been challenged on equal protection grounds. In California, for instance, a SLAPP plaintiff (More University) asserted that the state’s anti-SLAPP law violated its right to equal protection by interfering with its ability to engage in the judicial process.<sup>96</sup> The court, in

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<sup>92</sup> Pring & Cana, *supra* note 91, at 953.

<sup>93</sup> *Id.*

<sup>94</sup> One commentator recently proposed that *POME* be incorporated into California’s anti-SLAPP statute to balance First Amendment interests and serve as a deterrent to prospective bad-faith SLAPP filers. See Jeremiah A. Ho, Note, *I’ll Huff and I’ll Puff—But Then You’ll Blow My Case Away: Dealing with Dismissed and Bad-Faith Defendants Under California’s Anti-SLAPP Statute*, 30 WHITTIER L. REV. 533, 618 (2009).

<sup>95</sup> Constitutional challenges to anti-SLAPP laws have not been limited to equal protection and due process, although they are among the most commonly raised concerns. Other constitutional challenges have arisen, for instance, from statutes’ purportedly vague language. The Rhode Island Supreme Court addressed a claim that “issues of public concern” is unconstitutionally vague, and once again upheld the state’s anti-SLAPP statute as consistent with the state and federal constitutions. *Global Waste Recycling, Inc. v. Mallette*, 762 A.2d 1208, 1214 (R.I. 2000). A Louisiana state court rejected a similar constitutional challenge to the construction of state anti-SLAPP legislation, which also contains “probability of success” language. *Lee v. Pennington*, 830 So. 2d 1037, 1042 (La. Ct. App. 2002), *cert. denied*, 836 So. 2d 52 (La. 2003). The court concluded that the phrase was not unconstitutionally vague, noting that its interpretation was informed by case law and legislative intent. *Id.* The court explained that its “holding in *Stern* clearly articulates the standard to be applied in determining the ‘probability of success’ as the standard and/or elements of the tort the plaintiff alleges the defendant committed, coupled with the legislative intent set forth when the statute was enacted.” *Id.* (discussing *Stern v. Doe*, 806 So. 2d 98, 101 (La. Ct. App. 2001)).

<sup>96</sup> See, e.g., *Lafayette Morehouse, Inc. v. Chronicle Publ’g Co.*, 44 Cal. Rptr. 2d 46 (Cal. Ct. App. 1995).

response, explained that the statute's classification of litigants bore a rational relationship to the legislature's objective of discouraging frivolous litigation.<sup>97</sup> The court also emphasized that the anti-SLAPP provision did not prohibit any particular category of complaints, but rather specified an approach that would allow courts to consider the merit of certain claims during the initial phase of litigation.<sup>98</sup>

A Louisiana appellate court relied on a similar rationale in rejecting an equal protection challenge to Louisiana's anti-SLAPP statute.<sup>99</sup> The challenge arose from the statute's exemption of actions brought on behalf of the state from anti-SLAPP measures.<sup>100</sup> The court responded that the legislature has broad authority to establish statutory categories, and because the law does not use explicitly prohibited criteria—race, religion, age, gender, culture, politics, or physical characteristics—to establish categories, the anti-SLAPP law would pass constitutional muster as long as it furthered a legitimate state interest.<sup>101</sup> The court briefly discussed the First Amendment values underlying the statute, noting the corresponding state interest, and emphasized that the statute did not exclude any individual or group from the judicial process.<sup>102</sup> Consistent with this conclusion, modern anti-SLAPP jurisprudence generally suggests that equal protection challenges do not presently pose a significant threat to state anti-SLAPP statutes.

## 2. Due Process

Anti-SLAPP statutes have repeatedly been challenged on due process grounds, often as a result of their respective burden-shifting mechanisms. A number of state anti-SLAPP laws are administered by way of a two-pronged

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<sup>97</sup> The court explained that “[s]tatutes that classify litigants and impose differing procedural requirements are generally valid so long as classification is supported by a rational basis,” concluding that “[t]he procedure mandated by section 425.16 is rationally related to the Legislature’s expressed goal” of curbing a “disturbing increase” in SLAPPs. *Id.* at 52 (discussing CAL. CIV. PROC. CODE § 425.16 (West 1993)).

<sup>98</sup> *Id.* (“The statute does not bar complaints which arise from a person’s exercise of his or her rights of free speech or petition for redress of grievances, but only provides a mechanism through which such complaints can be evaluated at an early stage of the litigation process.”).

<sup>99</sup> *Lee*, 830 So. 2d at 1043.

<sup>100</sup> LA. CODE CIV. PROC. ANN. art. 971(E) (2005) provides: “This Article shall not apply to any enforcement action brought on behalf of the state of Louisiana by the attorney general, district attorney, or city attorney acting as a public prosecutor.”

<sup>101</sup> *Lee*, 830 So. 2d at 1042.

<sup>102</sup> *Id.* at 1042–43.

test.<sup>103</sup> The SLAPP defendant initially bears the burden of establishing that the actions at issue are protected under the statute.<sup>104</sup> If this threshold inquiry is satisfied, the burden shifts to the plaintiff; if the plaintiff cannot demonstrate some level of merit underlying his claims, the defendant prevails.<sup>105</sup> The remedies for victorious SLAPP defendants vary among jurisdictions, but dismissal and attorney's fees are most common. This system supports both the protection of First Amendment rights and the furtherance of judicial economy. Because neither party is required to establish the intent of the other—a showing which nearly always requires discovery—the burden-shifting approach allows for SLAPPs to be efficiently managed and quickly dismissed. If SLAPP defendants who successfully invoke an anti-SLAPP statute are nonetheless required to participate in costly litigation, the statutes' ability to curb frivolous lawsuits intended to silence public speech may become negligible. The Massachusetts anti-SLAPP statute does not follow the typical burden-shifting model and, consequently, allows SLAPP plaintiffs to entangle defendants in burdensome litigation. The statute modifies the first prong of the majority inquiry by requiring that the defendant establish that the plaintiff's claims are based *exclusively* on protected actions.<sup>106</sup> It then substitutes for the second prong a requirement that the plaintiff prove, by a preponderance of the evidence, that the defendant's actions caused actual harm and were without factual and legal support.<sup>107</sup> Also available to the plaintiff is the opportunity to establish, as a defense, the defendant's mental state, which often requires extensive—and burdensome—discovery.

Noticeably absent from the Massachusetts anti-SLAPP inquiry is the merit of the plaintiff's claims. California's anti-SLAPP statute, in contrast to Massachusetts's law,<sup>108</sup> provides that if the defendant establishes a *prima facie* case that the actions underlying the litigation are protected, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the

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<sup>103</sup> California's anti-SLAPP statute is commonly cited for this approach. CAL. CIV. PROC. CODE § 425.16(b) (West 2004).

<sup>104</sup> *Id.*

<sup>105</sup> *Lee*, 830 So. 2d at 1041.

<sup>106</sup> See *Ehrlich v. Stern*, 908 N.E.2d 797, 802–03 (Mass. App. Ct. 2009) (“[T]he anti-SLAPP inquiry produces an all or nothing result as to each count the complaint contains. Either the count survives the inquiry or it does not, and the statute does not create a process for parsing counts to segregate components that can proceed from those that cannot.”). In California, by contrast, “[w]here a complaint contains both SLAPP and non-SLAPP causes of action, the SLAPP claims alone may be stricken.” *Summit Media LLC v. City of L.A.*, Cal., 530 F. Supp. 2d 1084, 1095 (C.D. Cal. 2008); *Shekhter v. Fin. Indem. Co.*, 106 Cal. Rptr. 2d 843, 849 (Cal. Ct. App. 2001).

<sup>107</sup> MASS GEN. LAWS ch. 231, § 59H (2008).

<sup>108</sup> *Id.*

merits.<sup>109</sup> To satisfy this burden, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”<sup>110</sup> Because the plaintiff generally must meet this burden prior to conducting discovery, it represents a significant obstacle to moving forward with the litigation, even where the claim is legitimate—and that is the observation from which due process challenges have emerged.

Merit requirements in state anti-SLAPP statutes, though advantageous from the perspective of judicial economy, have repeatedly been challenged on due process grounds. Among the claims underlying a 1994 constitutional challenge to California’s then-current anti-SLAPP provision was an assertion that by requiring the court to consider the evidence in reaching a conclusion on a motion to strike made pursuant to the statute, the law improperly denied the plaintiff the right to a jury trial.<sup>111</sup> Accordingly, the challengers asserted, the law infringed upon plaintiffs’ due process rights by requiring that they establish a claim’s probability of success prior to discovery, and that, in that case, discovery would reveal a triable issue of fact related to malice.<sup>112</sup> The California court rejected the constitutional challenge, but objections to anti-SLAPP statutes’ burden-shifting systems continued to emerge on due process grounds.<sup>113</sup>

State courts in Maine<sup>114</sup> and Louisiana have also rejected due process challenges to the states’ anti-SLAPP statutes. A Louisiana court rebutted an assertion that the state’s anti-SLAPP statute denies litigants due process of law by requiring that the trial court determine the plaintiff’s probability of success on the merits before allowing the case to go before a jury, explaining that anti-SLAPP motions turned on questions of law, which are reserved for

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<sup>109</sup> CAL. CIV. PROC. CODE § 425.16(b) (West 2004). The Louisiana and Oregon anti-SLAPP statutes also require that the plaintiff establish a probability of prevailing. LA. CODE CIV. PROC. ANN. art. 971(A) (2005); OR. REV. STAT. § 31.150 (2007); *see* *Baxter v. Scott*, 847 So. 2d 225, 230 (La. Ct. App. 2003); *Gardner v. Martino*, 563 F.3d 981, 986 (9th Cir. 2009).

<sup>110</sup> *Matson v. Dvorak*, 46 Cal. Rptr. 2d 880, 886 (Cal. Ct. App. 1995); *see also* *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 744 (Cal. 2003); *Navellier v. Sletten*, 52 P.3d 703, 708 (Cal. 2002); *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002).

<sup>111</sup> *Dixon v. Superior Court*, 36 Cal. Rptr. 2d 687, 696 (Cal. Ct. App. 1994).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 696–97.

<sup>114</sup> *Maietta Constr., Inc. v. Wainwright*, No. CV 02-594, 2003 WL 23148892, at \*3 (Me. Super. Ct. July 29, 2003) (rebutting plaintiffs’ assertion that the Maine anti-SLAPP statute denied them due process by interfering with their right to trial by jury, reasoning that “[t]he Law Court has dismissed a suit under the anti-SLAPP statute thereby implicitly recognizing the right of the Legislature to pass such a statute. Hence, there is no obvious due process violation.” (citation omitted)).

the court, not a jury.<sup>115</sup> The court explained that, where the anti-SLAPP statute has been invoked, the non-moving party need only show a probability of success at trial based upon the elements of his claim, a determination which does not require the trial judge to *weigh* the evidence.<sup>116</sup> A California appellate court used similar reasoning to explain the constitutionality, in the context of the right to trial by jury, of that state's anti-SLAPP provision.<sup>117</sup> Moreover, the California Supreme Court has noted that the legislature, in developing the state's anti-SLAPP provision, took measures to avoid wrongfully depriving the non-moving party of the right to trial by jury.<sup>118</sup>

While anti-SLAPP measures have generally survived constitutional challenges based on due process and jury trial rights, constitutional concerns led the New Hampshire legislature to abandon an anti-SLAPP bill, which was developed with the California anti-SLAPP statute as a model. The proposed law required that, in order to avoid dismissal, a plaintiff establish

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<sup>115</sup> *Lee*, 830 So. 2d at 1043 (“[T]he only purpose of [the state’s anti-SLAPP provision] is to act as a procedural screen for meritless suits, which is a question of law for a court to determine at every stage of a legal proceeding.”).

<sup>116</sup> *Id.*

<sup>117</sup> *Moore v. Shaw*, 10 Cal. Rptr. 3d 154, 161–62 (Cal. Ct. App. 2004) (“[S]ection 425.16 is analogous to other statutes requiring the plaintiff to make a threshold showing, which are aimed at eliminating meritless litigation at an early stage. . . . [It] does not impair the right to a trial by jury because the trial court does not weigh the evidence in ruling on the motion, but merely determines whether a prima facie showing has been made which would warrant the claim going forward. Whether or not the evidence is in conflict, if the plaintiff has presented a sufficient pleading and has presented evidence showing that a prima facie case will be established at trial, the plaintiff is entitled to proceed.” (citations omitted)); *see also* *Berg & Berg Enters., LLC v. Sherwood Partners, Inc.*, 32 Cal. Rptr. 3d 325, 334 n.7 (Cal. Ct. App. 2005) (“The court does not weigh the evidence but instead merely assesses whether the plaintiff has stated and substantiated his or her claim . . . . So applied, the statute passes constitutional muster in preserving the right to trial by jury.”).

<sup>118</sup> *S.B. Beach Props. v. Berti*, 138 P.3d 713, 716–17 (Cal. 2006) (“The Legislature originally passed an anti-SLAPP bill that contained a ‘pleading hurdle’ which prohibited a person from pleading a SLAPP suit cause of action until a court granted leave to do so after demonstration of a ‘substantial probability’ of success on the merits. The Governor vetoed this bill. The Legislature then passed Senate Bill No. 1264, which became section 425.16. Unlike the previous enactment, Senate Bill No. 1264 gave plaintiffs an unencumbered opportunity to make SLAPP suit allegations, prior to the motion to strike hearing. . . . This movement—from a ‘pleading hurdle’ to a *mandatory* special motion to strike—was made at the request of the State Bar’s Committee on the Administration of Justice (Committee), which is concerned that a ‘pleading hurdle’ may violate a plaintiff’s constitutional right to a jury trial. The Committee is more comfortable with the ‘motion to strike’ approach, which permits the plaintiff some opportunity to conduct discovery while preserving the ability of the defendant to dismiss the lawsuit at an early, and, perhaps, inexpensive stage.” (internal citations and quotation marks omitted)).



“a probability of prevailing on the claim . . . .”<sup>119</sup> The senate consulted the judiciary to determine if the anti-SLAPP statute was consistent with the state’s constitution, and the court, citing the merit requirement, concluded that the statute would violate the constitution by interfering with plaintiffs’ right to trial by jury.<sup>120</sup> Although the New Hampshire court reached this conclusion on state constitutional grounds, their conclusion further reinforces the plausibility of the due process argument against anti-SLAPP provisions.

### *C. Applicability*

The efficacy of anti-SLAPP measures is particularly limited where SLAPP targets—or, of greater concern, those who are silenced by fear of becoming targets—do not know with certainty whether the statutory protections will be available to them in case of litigation. Although this concern is pervasive, and is affected by nearly every provision of an anti-SLAPP statute, more clearly defining the “who” and “what” underlying the anti-SLAPP inquiry would provide greater certainty. Just as homeowners associations and condominium unit owners have obtained explicit protection from SLAPPs under Florida law,<sup>121</sup> other groups and activities could benefit from explicit immunity. This section provides, as an example, a statutory provision common to the anti-SLAPP law, and sets forth examples of both status and subject matter for which, if explicitly protected, would reinforce the purpose of anti-SLAPP laws.

#### *1. Protected Activities and the Public Concern Requirement*

A majority of the enacted state anti-SLAPP statutes stipulate that, in order to successfully invoke the law, a litigant’s purportedly protected communication must have been about a matter of public concern. The rationale underlying this requirement is that anti-SLAPP measures will be available only where the defendants’ conduct involved legitimate petitioning activity. The presence or absence of the public concern criteria has, in certain contexts, a significant impact on the outcome of anti-SLAPP motions and illustrates the fundamental importance of clear statutory terms.

Massachusetts is among the states in which the public concern standard has generated a great deal of uncertainty and accompanying litigation. The “public concern” concept, which is inherently equivocal,<sup>122</sup> is further

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<sup>119</sup> S. 661, 1994 Leg., Reg. Sess. (N.H. 1994).

<sup>120</sup> Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012 (N.H. 1994).

<sup>121</sup> See FLA. STAT. §§ 718.1224, 720.304(4) (2010).

<sup>122</sup> The Massachusetts Supreme Court, discussing the state’s anti-SLAPP statute, acknowledged this interpretive challenge:

convoluted by courts' inconsistent interpretation of anti-SLAPP statutes with respect to the public concern requirement. The Massachusetts Anti-SLAPP Act, enacted in 1994, was initially treated as containing a public concern requirement; in 1996, a state superior court judge denied an anti-SLAPP motion in a case (*Sullivan*) involving a housing dispute between ex-spouses, concluding that the litigation involved a private interest and not a matter of public concern.<sup>123</sup> The court relied on a Colorado Supreme Court decision interpreting that state's public concern constraint,<sup>124</sup> as well as the legislative history of the Massachusetts law.<sup>125</sup> Since that decision, however, the state's courts have abandoned this view; the state's supreme court, upholding a lower court decision,<sup>126</sup> held that the availability of anti-SLAPP motions does not turn on a public concern standard.<sup>127</sup> Like the *Sullivan* court, the state supreme court relied on legislative history; however, in contrast to the *Sullivan* court, it focused on textual amendments to the original anti-SLAPP bill rather than the floor debates.<sup>128</sup> Because the phrase "public concern" had been eliminated from the bill's text prior to enactment, the court concluded that the legislature had intentionally omitted the term from the enacted law.<sup>129</sup>

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We recognize that distinguishing matters of public from matters of private concern is not always clear-cut. Such a consideration is reflected in Justice Thurgood Marshall's objection to creating a conditional constitutional privilege for defamation published in connection with an event that is found to be of "public or general concern": "assuming that . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject," even though courts "are not anointed with any extraordinary prescience."

*Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 941 n.14 (Mass. 1998) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)).

<sup>123</sup> *Sullivan v. Murphy*, 5 Mass. L. Rep. 3, 68 (Mass. Super. Ct. 1996), *cert. denied*, 435 Mass. 1107 (Mass. 2001).

<sup>124</sup> *Protect Our Mountain Env't, Inc. v. District Court (POME)*, 677 P.2d 1361 (Colo. 1984). *POME* involved Colorado's judicial doctrine governing cases that have been defined by statute in other states as SLAPPs; Colorado's legislature has not, to date, enacted an anti-SLAPP measure.

<sup>125</sup> *Sullivan*, 5 Mass. L. Rep. at 68.

<sup>126</sup> *Duracraft Corp. v. Holmes Prods. Corp.*, 678 N.E.2d 1196 (Mass. App. Ct. 1997).

<sup>127</sup> *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 941-42 (Mass. 1998).

<sup>128</sup> *Id.* at 941.

<sup>129</sup> *Id.* ("[D]espite expressions in the legislative debate about the need to protect the right of petition on matters of public concern, the phrase was removed from the text . . . . [I]t is inappropriate for a judge to reinsert the rejected condition that the moving

Massachusetts, though certainly in the minority,<sup>130</sup> is not alone in forgoing a public concern requirement in its anti-SLAPP law; Illinois' anti-SLAPP measure<sup>131</sup> is also without such subject matter criteria. Critics have suggested that the omission of a public concern standard, though certainly advantageous to some, is inconsistent with the purported purpose of anti-SLAPP law.<sup>132</sup> The balance the model strikes between opposing parties' First Amendment rights is of particular concern, as it is often neglected by commentary on this area of the law. The assertion of those rights has the potential to be both a sword and a shield. One commentator, reviewing the Illinois anti-SLAPP statute, articulated the potential for abuse of the anti-SLAPP motion in the absence of a public concern requirement confining anti-SLAPP motions to cases involving matters under review by a governmental entity:

These statutes tip the scales decidedly in favor of a defendant's right to petition or speech at the expense of a plaintiff's right to access the courts. The result is the potential for a paradoxical form of vexatious litigation. While anti-SLAPP statutes are designed, at least in part, to avoid the use of judicial processes themselves as a means of intimidating or punishing an opponent, the most broadly drawn anti-SLAPP statutes arguably have the same effect on potential plaintiffs because they expand use of anti-SLAPP remedies to conduct that has little or no connection to the traditional SLAPP paradigm.<sup>133</sup>

Where a defendant is able to prevail on a bad faith anti-SLAPP motion, the success of the anti-SLAPP motion comes at the expense of the opposing party's petitioning rights: "[s]uch an encroachment is not as direct as the filing of a SLAPP action. Instead, the interference is subtle and indirect when an anti-SLAPP motion is used to justify a defendant's meritless exercise of

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party's activity must involve a matter of public concern." (internal quotation marks omitted)).

<sup>130</sup> For an overview of the Massachusetts anti-SLAPP statute and the state courts' approach to the issue of public concern, see Jessica Block, *Civil Procedure—Special Motion to Dismiss—Anti-SLAPP Statute*, 91 MASS. L. REV. 97, 98 (2008) ("[The Massachusetts anti-SLAPP statute] appears to be the lone anti-SLAPP statute in the United States that does not require that petitioning activity be 'of public concern,' the Legislature having dropped that requirement, which was included in a previous, rejected iteration of the bill. The statute encompasses matters of both private and public interests.").

<sup>131</sup> For an overview of the Illinois Citizen Participation Act, see Sobczak, *supra* note 55, at 559.

<sup>132</sup> See Ho, *supra* note 94, at 619.

<sup>133</sup> *Id.* at 580–81.

political process while knocking out a plaintiff's genuine cause of action."<sup>134</sup> In the absence of a statutory remedy, it is difficult for courts to "separat[e] the wolves from the sheep."<sup>135</sup>

Because the public concern requirement is absent in some state statutes, and present but unclear in others, the efficacy of anti-SLAPP measures—and the ability of individuals and groups that might otherwise be silenced to rely on them—could be substantially improved by adding language clarifying those matters which are, by their nature, to be protected by law.

## 2. Defining Public Concern

The debate surrounding anti-SLAPP legislation has resulted in a body of literature analyzing the measures as falling somewhere along a linear spectrum from broad to narrow, with respect to the activities and parties they protect.<sup>136</sup> Among the statutes that have been described as "narrow" are those which limit protected petitioning activities to statutorily specified causes of action<sup>137</sup> or subject matter. Pennsylvania's anti-SLAPP law, for instance, is viewed as narrow relative to other anti-SLAPP measures because it extends only to petitioning activities "relating to enforcement or implementation of an environmental law or regulation."<sup>138</sup> Other statutes limit not the subject matter, but rather the status of the parties engaged in the lawsuit. Florida's anti-SLAPP law, for instance, makes its remedy<sup>139</sup> available only to

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<sup>134</sup> Ho, *supra* note 94, at 594.

<sup>135</sup> *Id.* at 619.

<sup>136</sup> See, e.g., Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1238 (2007) ("[T]his Note categorizes the different definitions of protected activity under [state] anti-SLAPP statutes as [n]arrow, [m]oderate, or [b]road."); London Wright-Pegs, Note, *The Media SLAPP Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant*, 16 UCLA ENT. L. REV. 323, 332 (2009) ("Many states have drafted and interpreted their anti-SLAPP statutes differently, varying on the degree of protected activity. The statutes can be separated into three categories: narrow, moderate and broad.").

<sup>137</sup> Oklahoma's anti-SLAPP statute, for instance, limits its protection to libel cases. OKLA. STAT. tit. 12, § 1443.1 (1999).

<sup>138</sup> 27 PA. CONS. STAT. § 8302 (2002); see Hartzler, *supra* note 136, at 1250 ("Pennsylvania's anti-SLAPP statute falls into the category of narrow statutes because by its title, it applies only to environmental law or regulation.").

<sup>139</sup> "A person or entity may petition the court for an order dismissing the action or granting final judgment in favor of that person or entity." FLA. STAT. ANN. § 768.295(5) (West 2005).

defendants being sued by a “governmental entity,”<sup>140</sup> and the state’s supplemental anti-SLAPP measures, passed in 2008, provide additional protection to a defined class of defendants, specifically “prohibiting [SLAPPs] by governmental entities, business entities, and individuals against condominium unit owners who address matters concerning their condominium association”<sup>141</sup> as well as “parcel owners who address matters concerning their homeowners’ association.”<sup>142</sup> These statutes recognize certain groups as uniquely susceptible to the legal claims that anti-SLAPP statutes seek to deter, and provide valuable guidance for courts faced with the task of identifying legitimate anti-SLAPP motions. Accordingly, this Note proposes that legislatures enumerate categories of litigants which, as a matter of public policy, deserve explicit protection from intimidation by litigation. Two examples discussed here, environmental protection and expert opinion, illustrate the value of defining matters of public interest—and allowing the courts to “fill in the blanks” rather than leaving them to write the entire book.

*a. Defining Protected Subject Matter: The Environmental Protection Example*

Environmental protection, though in certain contexts a highly controversial subject, is undoubtedly a matter of public concern. Intuition suggests that the quality of the air we breathe, the water we drink, and the land upon which we live affects every member of the public and is, accordingly, a quintessential matter of public concern. Recognizing the public’s substantial interest in environmental protection, federal and state legislatures have codified not only the interest itself, but also the role that citizens are to play in protecting that interest. While the notice-and-comment process<sup>143</sup> is an acknowledgement of the broad role of the public in governmental decision-making, it is the provision for citizen suits in various federal and state statutes that underscores the exceptional importance of public participation in environmental protection.<sup>144</sup> Citizen suit provisions

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<sup>140</sup> FLA. STAT. § 768.295(2) (2010); *see also* Monique Leahy, *Key Supporting Citations—“SLAPP” Lawsuits—Authority*, in 20 FLA. PRAC., SUM. JDGMT. & REL. TERM. MOTIONS § 3:27 (2009).

<sup>141</sup> FLA. STAT. § 718.1224(1) (2010).

<sup>142</sup> FLA. STAT. § 720.304(4) (2010).

<sup>143</sup> *See* Administrative Procedure Act, 5 U.S.C. § 553(b)–553(c) (2006).

<sup>144</sup> Citizen suit provisions are not confined to environmental laws. In fact, citizen suit provisions in civil rights acts served as a guide for parallel provisions in federal environmental statutes (which, in turn, were used as models for state statutes). Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 701 (1995). However, these provisions are particularly prevalent among environmental statutes. Federal statutes containing citizen

have proven to be tools essential to the enforcement of various environmental statutes; enforcement of the National Environmental Policy Act (NEPA), for instance, has been undertaken almost exclusively by private individuals and organizations.<sup>145</sup> These provisions establish for the public an active role in the enforcement of environmental laws and the long-term maintenance of environmental quality. The principles underlying the establishment—and the success—of citizen suit provisions in the enforcement of environmental law support the establishment of explicit protections for petitioning activities related to environmental protection. SLAPPs not only deter individuals and groups from fulfilling their statutorily granted responsibility to support the

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suit provisions include, among others, the following: Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619 (2006); Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (2006); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (2006); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) (2006); Clean Water Act, 33 U.S.C. § 1365(d) (2006); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g)(4) (2006); Deepwater Port Act of 1974, 33 U.S.C. § 1515(d) (2006); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (2006); Noise Control Act of 1972, 42 U.S.C. § 4911(d) (2006); Energy Sources Development Act, 42 U.S.C. § 5851(e)(2) (2006); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) (2006); Solid Waste Disposal Act, 42 U.S.C. § 6972(e) (2006); Clean Air Act, 42 U.S.C. §§ 7604, 7607(f) (2006); Powerplant and Industrial Fuel Act, 42 U.S.C. § 8435(d) (2006); Ocean Thermal Energy Conservation Act, 42 U.S.C. § 9124(d) (2006); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) (2006). *See* Plater, *supra*, at 701 n.105; *see also* Daerr-Bannon, *supra* note 4, at 343 (“Because SLAPP occurs most frequently in the environmental arena and citizen enforcement of environmental laws is important, citizen-suit provisions are part of . . . major environmental statutes”); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1187–90 (2009) (discussing the significance of citizen suit provisions in federal environmental law and explaining that the first such provision, contained in the Clean Air Act of 1970, “imagined citizens as both private enforcers of existing EPA dictates as well as direct watchdogs on EPA activities”). For a discussion of state law citizen suit provisions, *see* Susan George, et al., *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity*, 6 U. BALT. J. ENVTL. L. 1, 14–20 (1997); Edward Lloyd, *Citizen Suits and Defenses Against Them*, SP059 ALI-ABA 781, 814–17 (2009).

<sup>145</sup> Plater, *supra* note 144, at 701–02 (“[H]ow many enforcement actions have been brought against federal agencies by Congress, the President, or the Department of Justice for violations of [NEPA]? The answer is obvious: virtually zero. The hundreds of law suits which have made NEPA a significant environmental protection statute . . . have been brought by private citizens.”). Citizen suits are, in many instances, the sole means for catalyzing governmental action to support environmental protection. *Id.* at 702 (“Many of us who have worked with citizen groups have on occasion been asked by a federal official, ‘Please tell me you will sue me if I don’t do what the law requires, so that I can go to my superiors and tell them that we must enforce the law.’”); *id.* (“Environmental law . . . has been formed by civically-driven citizen litigation . . . [P]laintiffs, in effect, take on a major tactical portion of the job of enforcing societal laws.”).

enforcement of environmental laws,<sup>146</sup> they also stifle petitioning activities which, although outside the scope of citizen suit provisions, are wholly consistent with the rationales underlying those provisions. The very citizens and organizations that have sought to protect the public and the environment by way of citizen suits and related petitioning activities have too often found themselves with the perverse reward of a SLAPP.<sup>147</sup>

Courts faced with SLAPP litigation have repeatedly acknowledged the importance of citizen participation in environmental protection. A New York court, addressing a frivolous lawsuit brought by a developer against a nonprofit conservation organization, noted that:

[T]he participation of citizen watch groups in environmental planning has been "essential to ensure that governmental efforts at environmental protection are fully effective." A number of citizen suits "have established essential principles of early review and strict adherence to the procedures laid out in [the State Environmental Quality Review Act<sup>148</sup>] which have served as crucial tools in making projects safe for the environment." Citizen activism, if it is to continue, must be fostered and protected from lawsuits designed solely or primarily to intimidate and extract a price for participation.<sup>149</sup>

The Colorado Supreme Court implicitly adopted a similar view in deciding *Protect Our Mountain Environment, Inc. v. District Court (POME)*,<sup>150</sup> which involved a SLAPP suit brought by a developer against an environmental group.<sup>151</sup> In deciding *POME*, the court articulated the state's anti-SLAPP judicial doctrine, which remains intact in Colorado, and as noted, has

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<sup>146</sup> See George, et al., *supra* note 144, at 27–28 (identifying SLAPPs as a deterrent to the filing of citizen suits under environmental statutes); James Olmsted, *Handling the Land Use Case: A User's Manual for the Public Interest Attorney*, 19 J. ENVTL. L. & LITIG. 23, 38 n.12 (2004) ("SLAPP suits may follow unsuccessful citizen suits and are meant to discourage citizens from bringing such lawsuits in the future.").

<sup>147</sup> See Cymie Payne, *Local Regulation of Natural Resources: Efficiency, Effectiveness, and Fairness of Wetlands Permitting in Massachusetts*, 28 ENVTL. L. 519, 560 (1998) ("Possibly the greatest threat to conservation commissions and similar forms of citizen participation in government is the strategic lawsuit against public participation . . .").

<sup>148</sup> N.Y. ENVTL. CONSERV. LAW § 8.6 (McKinney 1976).

<sup>149</sup> *Gordon v. Marrone*, 151 Misc. 2d 164, 169–70 (N.Y. 1991) (quoting Robert Abrams, N.Y. State Att'y Gen., Address at Center for Environmental Legal Studies, Pace University School of Law (Oct. 14, 1989)).

<sup>150</sup> 677 P.2d 1361, 1369 (Colo. 1984).

<sup>151</sup> *Id.* at 1370 (anti-SLAPP motion to dismiss should not have been denied where a developer brought suit against an environmental group that sought to have a rezoning decision benefitting the developer reversed).

influenced courts and legislatures in other jurisdictions. The fundamental importance of citizen participation in environmental law and policymaking,<sup>152</sup> in conjunction with the unique vulnerability—resulting from both status<sup>153</sup> and focus<sup>154</sup>—of those individuals and groups that engage in relevant petitioning activities to retaliatory lawsuits, suggest that the anti-SLAPP measures should not leave protection for such activities open to attack by SLAPPers.<sup>155</sup>

### *b. Defining Protected Status: The Expert Opinion Example*

In both the legislature and the courtroom, expert opinion and testimony is an essential component of various decision-making processes. Those who hold particular credentials in their respective fields are explicitly distinguished from laypersons with respect to their role in governmental action, and the policy underlying that distinction supports the extension of anti-SLAPP measures to instances in which experts are sued for their involvement with governmental decision-making.

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<sup>152</sup> Plater, *supra* note 144, at 697–98, 702 (discussing “the critical role that has been played and will continue to be played by citizens actively engaged in environmental law” and arguing that “government cannot do it alone. . . . [B]ureaucratic regulators have never been and can never be a sufficient public counterweight to the industrial marketplace’s inclination and power.”).

<sup>153</sup> Although established environmental organizations have repeatedly been attacked by SLAPPs, see PRING & CANAN, *supra* note 2, at 85 (identifying the Sierra Club as “the nation’s leading SLAPP target”), others have stated that:

It should be understood that “[t]he target of [SLAPPs] are generally not radical environmentalists, nor professional activists: they are ordinary middle-class citizens who are concerned about their local environment and have no history of political activity. This concentration on middle-class citizens is no accident. They often have the most to lose, and don’t have the support and ideological commitment that a professional environmentalist in a large environmental organization usually has.”

Avi Brisman, *Crime-Environment Relationships and Environmental Justice*, 6 SEATTLE J. SOC. JUST. 727, 809 (2008) (quoting SHARON BEDER, *GLOBAL SPIN: THE CORPORATE ASSAULT ON ENVIRONMENTALISM* 66–67 (2002)); see also PRING & CANAN, *supra* note 2, at 85 (stating that the Sierra Club is “a very atypical [SLAPP target]” because, unlike “the local environmentalists and small groups usually targeted,” it is “a real Goliath”).

<sup>154</sup> Land use and development disputes are the most common source of SLAPP litigation. Payne, *supra* note 147, at 561 (discussing George N. Pring & Penelope A. Canan, *SLAPPs: An Overview of the Practice*, C935 ALI-ABA 1, 10 (1994)); see also *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 752 n.16 (R.I. 2004); P. Caleb Patterson, *Have I been SLAPPED? Arkansas’s Attempt to Curb Abusive Litigation: The Citizen Participation in Government Act*, 60 ARK. L. REV. 507, 528–29 (discussing development disputes as a source of SLAPP litigation and identifying “eco-SLAPPs”).

<sup>155</sup> See Payne, *supra* note 147, at 562 (“If the anti-SLAPP law works properly, it will protect the participative process on which conservation commissions rely.”).



Moreover, situations in which governmental entities have requested the opinion or guidance of experts have been further distinguished from those which do not involve such solicitation. Massachusetts courts have addressed this situation in both judicial and executive agency contexts. In 2005, the state's supreme court addressed the applicability of the Massachusetts anti-SLAPP law to civil litigation arising from statements made in an expert's affidavit.<sup>156</sup> The Massachusetts Board of Registration in Medicine brought a disciplinary action against a psychiatrist and sought the assistance of a second psychiatrist—a certified addiction psychiatry specialist and Director of Addiction Services at Massachusetts General Hospital—to assist in the Board's examination of the complaints.<sup>157</sup> After being exonerated, the former brought suit against the latter on theories of expert witness malpractice/negligence, defamation, malicious prosecution, and interference with contractual relations.<sup>158</sup> The case was dismissed pursuant to the anti-SLAPP statute, but was reversed on appeal.<sup>159</sup> The supreme court held that the anti-SLAPP measure was inapplicable because, in its view, "the statute is designed to protect overtures to the government by parties petitioning in their status as citizens. It is not intended to apply to those performing services for the government as contractors."<sup>160</sup> In reaching its conclusion, the court relied on the statutory language referring to the "right of petition under the constitution," suggesting that this constitutional reference evidenced the legislature's intent to extend anti-SLAPP immunity only where the petitioning activity at issue was undertaken to support the moving party's *own* interests.<sup>161</sup> The dissent, criticizing the majority's reliance on purported legislative intent, articulated the public policy favoring immunity and reinforcing the value of making explicit the protection of witnesses:

There is nothing absurd or unreasonable about protecting all witnesses from lawsuits based on the statements they give during the course of agency proceedings. To the contrary, absolute immunity from suit has long been accorded to witnesses in judicial proceedings, even if their testimony is knowingly false. The privilege is grounded in the view that it is more important that witnesses be free from fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy. Massachusetts law recognizing such absolute immunity accords with well-established law across the country. This immunity is accorded not merely for statements made as part of a witness's testimony at trial, but for

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<sup>156</sup> *Kobrin v. Gastfriend*, 821 N.E.2d 60, 61 (Mass. 2005).

<sup>157</sup> *Id.* at 61–62.

<sup>158</sup> *Id.* at 62.

<sup>159</sup> *Id.* at 63.

<sup>160</sup> *Id.* at 64.

<sup>161</sup> *Id.* at 66.

statements made in the context of a proposed judicial proceeding. This absolute privilege applies not only to oral testimony in court, but also to statements or testimony given in written form.<sup>162</sup>

This policy supporting the protection of witnesses, in conjunction with the established recognition of experts as essential to effective judicial and administrative processes, supports the availability of anti-SLAPP protections to expert witnesses—if not all witnesses. In order to avoid the chilling effect associated with SLAPPs, and ensure experts' willingness to participate in governmental processes, there must be substantial certainty in the law.<sup>163</sup>

The Massachusetts Supreme Court has also addressed the applicability of the anti-SLAPP law to expert opinion submitted to an executive agency. In *Baker v. Parsons*,<sup>164</sup> the Massachusetts Supreme Court addressed a case in which a permit applicant brought suit against a scientist who had, at an executive agency's request, provided her opinion on the proposed construction's ecological impact.<sup>165</sup> The United States Army Corps of Engineers, the permitting body, had requested comment from the Massachusetts Division of Fisheries regarding the construction of a pier on an island.<sup>166</sup> The Division, in developing its comments, asked Katherine Parsons, a biologist who had conducted environmental research on the island, to provide an opinion. In response, Parsons submitted a written statement explaining that the proposed site provided important wildlife habitat and was

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<sup>162</sup> *Kobrin*, 821 N.E.2d at 73 (citations and internal quotation marks omitted).

<sup>163</sup> The *Kobrin* dissent noted that the majority's holding raised more questions than it answered, and created substantial uncertainty with respect to the scope of the Massachusetts anti-SLAPP statute:

Today's decision casts a pall of uncertainty over the status of many persons who make statements to the government. What if an expert is hired by a petitioner—will the petitioner's "own interests" in the matter allow us to extend the protections of § 59H to the petitioner's disinterested expert, or does the fact that the individual expert has no "grievance of his own," deprive the expert of those protections? What about lobbyists or lawyers? They are customarily making statements to government officials on behalf of their clients, not on their own behalf, and are compensated for doing so. Is their connection to the proceeding also a "mere contractual connection" that deprives them of protection? What about persons who testify before agencies after being subpoenaed (by either the agency or by any of the parties)—such persons submit "statement[s]" in connection with the agency proceeding, but if they did not want to make statements of their own volition, are they pursuing their "own" grievances, or exercising their "right of petition under the constitution"?

*Kobrin*, 821 N.E.2d at 76–77 (Sosman, J., dissenting) (citations omitted).

<sup>164</sup> 750 N.E.2d 953, 955 (Mass. 2001).

<sup>165</sup> *Id.* at 955–56.

<sup>166</sup> *Id.*

therefore an improper location for the pier.<sup>167</sup> The property owner (Baker) who had requested the permit then brought suit against Parsons, alleging that her statement had caused citizens to pressure the Executive Office of Environmental Affairs to conduct an environmental impact review of the proposed construction.<sup>168</sup> Baker asserted that Parsons's statement amounted to intentional infliction of emotional distress, libel, slander, and civil rights violation, and resulted in damages including legal fees, lost income, and physical harm.<sup>169</sup>

Parsons is representative of a class of individuals whose contribution of expertise to government processes supports statutorily mandated protection, and this class is not alone in warranting this express protection. The media<sup>170</sup> and the medical community,<sup>171</sup> asserting similar rationales, have noted the particular risks posed by SLAPPs to certain members of their respective professions. Although statutorily outlining specific protections for these groups and others represents a challenge with respect to the policy decisions legislatures would have to make, these provisions would further the purposes of anti-SLAPP legislation.

#### D. Appealability

As with other characteristics, state anti-SLAPP laws vary with respect to appealability. Litigants' right to interlocutory appeal of anti-SLAPP motion decisions has been acknowledged in state courts in California,<sup>172</sup> Georgia,<sup>173</sup> Maine,<sup>174</sup> Massachusetts,<sup>175</sup> New Mexico,<sup>176</sup> and Pennsylvania,<sup>177</sup> and

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 956.

<sup>169</sup> *Id.* at 957 n.8. For additional discussion of *Baker*, see Rebecca Ariel Hoffberg, Note, *The Special Motion Requirements of the Massachusetts Anti-SLAPP Statute: A Real Slap in the Face for Traditional Civil Practice and Procedure*, 16 B.U. PUB. INT. L.J. 97, 107–10 (2006).

<sup>170</sup> See Soc'y of Prof'l Journalists & Baker and Hostetler LLP, *A Uniform Act Limiting Strategic Litigation Against Public Participation*, SOC'Y OF PROF'L JOURNALISTS, <http://www.spj.org/antislapp.asp> (last visited Mar. 15, 2010). See generally Hartzler, *supra* note 136, at 1235; Wright-Pegs, *supra* note 136, at 323.

<sup>171</sup> See Am. Med. Assoc. House of Delegates, *Report of Reference Committee K, AM. MED. ASSOC.*, <http://www.ama-assn.org/meetings/public/interim05/refcomkannotateda05.doc> (last visited Mar. 15, 2010).

<sup>172</sup> See *Platypus Wear, Inc. v. Goldberg*, 83 Cal. Rptr. 3d 95, 98 (Cal. Ct. App. 2008).

<sup>173</sup> See *Harkins v. Atlanta Humane Soc'y*, 590 S.E.2d 737 (Ga. Ct. App. 2003).

<sup>174</sup> See *Schelling v. Lindell*, 942 A.2d 1226, 1229–30 (Me. 2008).

<sup>175</sup> See *Fabre v. Walton*, 781 N.E.2d 780, 784 (Mass. 2002).

federal courts have allowed immediate appeal of holdings under the anti-SLAPP statutes of California,<sup>178</sup> Louisiana,<sup>179</sup> and Georgia.<sup>180</sup> Maine's supreme court noted the consistency between the purposes of the anti-SLAPP and interlocutory appeal procedures, emphasizing that the court "allow[s] interlocutory appeals from denials of special motions to dismiss brought pursuant to the anti-SLAPP statute because a failure to grant review . . . at this stage would impose additional litigation costs on defendants, the very harm the statute seeks to avoid, and would result in a loss of defendants' substantial rights."<sup>181</sup>

Federal courts rely on the collateral order doctrine set forth in *Cohen v. Beneficial Industrial Loan Corporation*<sup>182</sup> to identify circumstances in which interlocutory appeals should be granted, and many states have adopted a comparable analytical approach.<sup>183</sup> Under the collateral order doctrine, an order is immediately appealable if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment."<sup>184</sup> These criteria distinguish cases in which an anti-SLAPP motion is granted, and those in which such a motion is denied. As noted, SLAPPs differ from other types of litigation because victory and defeat lie not in final judgment, but in the ability of one party to entangle the other in burdensome, frivolous litigation. The Pring and Canan model provides that "the moving party shall have a right to expedited appeal from a trial court order denying such a motion or from a trial court failure to rule on such a

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<sup>176</sup> New Mexico's anti-SLAPP statute states that "[a]ny party shall have the right to an expedited appeal from a trial court order on the special motions described in Subsection B." N.M. STAT. ANN. § 38-2-9.1(C) (2010).

<sup>177</sup> See *Penllyn Greene Assocs., L.P. v. Clouser*, 890 A.2d 424, 427 n.1 (Pa. Commw. Ct. 2005) (noting that Pennsylvania's anti-SLAPP statute provides for interlocutory appeal of right).

<sup>178</sup> See *Zamani v. Carnes*, 491 F.3d 990, 994 (9th Cir. 2007).

<sup>179</sup> See *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 183 (5th Cir. 2009).

<sup>180</sup> See *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290 (11th Cir. 2008).

<sup>181</sup> *Schelling v. Lindell*, 942 A.2d 1226, 1229–30 (Me. 2008).

<sup>182</sup> 337 U.S. 541, 546 (1949).

<sup>183</sup> Some jurisdictions recognize a doctrine substantially similar to the collateral order doctrine but assign it a different title. Massachusetts, for instance, relies on a "rule of present execution," which the state's supreme court has identified as "closely analogous" to the collateral order doctrine. *Borman v. Borman*, 393 N.E.2d 847, 852 (Mass. 1979); see also *Ruggiero v. Giamarco*, 901 N.E.2d 1233, 1239 n.7 (Mass. App. Ct. 2009) ("When a motion to dismiss under the anti-SLAPP statute is denied, invocation of the doctrine of present execution to permit immediate appellate review preserves the statutorily granted right to immunity.").

<sup>184</sup> *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (elaborating on the *Cohen* inquiry).

motion in expedited fashion.”<sup>185</sup> Provision for immediate appeal is consistent with both the objectives of the collateral order doctrine and anti-SLAPP laws, and supports the certainty which is essential to the statutes’ effective operation.

### III. CONCLUSION

While the SLAPP phenomenon has provoked widely varying reactions from legislatures, courts, scholars, and the public, the resulting statutes, judicial doctrines, and other procedural remedies share the prerequisite that, in order to achieve their objectives, the public have a high degree of certainty with respect to their protection. The immunity that these measures purport to provide is meaningless if those who would benefit from the statutes are nonetheless silenced because they cannot rely on protections which may or may not be available when they are improperly brought into court. In these circumstances, concrete statutory language is necessary to both reassure and protect those individuals and groups who are vulnerable to ambush by abusive litigation.

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<sup>185</sup> PRING & CANAN, *supra* note 2, at 203.

